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# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 703

BERT FRANKLIN MOORING and TEMASIA BRUCE HILL MOORING,

*Petitioners*

*vs.*

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. _____

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---

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Petitioners Bert Franklin Mooring and Temasia Bruce Hill Mooring pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above cause on January 6, 1962 (Appendix pp. 12-14), affirming judgments of conviction of the United States District Court for the Eastern District of North Carolina (App. App'x. pp. 9-11),[1] upon the verdict of a jury, of the offenses of conspiracy and transporting in interstate commerce a woman for the purpose of prostitution in violation of 18 U.S.C. Secs. 371 and 2421.

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[1] As herein used Appendix refers to the Appendix to this Petition; App. App'x. refers to Appellants' Appendix in the Court of Appeals; G. App'x. refers to the Government's Appendix in the Court of Appeals; R. refers to the record in the Court of Appeals.

## OPINIONS BELOW

The judgments of conviction of the District Court of the United States for the Eastern District of North Carolina (App. App'x. pp. 9-11) are not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix pp. 15-26) is as yet not reported, inasmuch as sufficient time has not elapsed since the decision and entry of the opinion of the United States Court of Appeals for the Fourth Circuit (January 6, 1962) for the opinion to be reported in the Advance Sheets of the Federal Reporter.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit was dated and entered January 6, 1962 (Appendix pp. 15-26). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## QUESTION PRESENTED

Where F. B. I. Agents, acting under a warrant of arrest for the Petitioners Mooring (App. App'x. pp. 1, 2) secured from William J. Thomas, United States Commissioner at Kinston, North Carolina, dated August 25, 1959, but without a search warrant (App. App'x. p. 17), went to the Petitioners 24-Hour Truck Stop, a place of business owned and operated by the Petitioners, (Gov. App'x. p. 39) on U. S. Highway #1 near Doswell, Virginia, a few miles north of Richmond, and there arrested the Moorings, Mr. Mooring being on the first floor of the building in the lunchroom and Mrs. Mooring being in her second floor bedroom (Gov. App'x. p. 32) and, in the process of arrest, the agents carried out an extensive search of the entire premises (App. App'x. p. 18) and in such search the agents discovered certain pads with checks, ordinarily used for meal tickets, bearing num-

bers on them with five dollars ($5.00) or the figure five (5) written on some and the figure ten (10) also written on one such check (App. App'x. pp. 20-21) and the agents also discovered certain prophylactics (Gov. App'x. p. 35) all in parts of the premises away from the immediate presence of the Petitioners at the time of the arrest, it being the Government's contention that the Petitioners had conspired with Joseph Lemon Boyette that he should transport the woman, Bonnie Jo Carter, from Kinston, North Carolina, to the Mooring Truck Stop, a place of business on U. S. Highway #1 north of Richmond, Virginia for the purpose of prostitution although she was ostensibly to act as a waitress in the dining room there, were these guest checks or meal tickets admissible in evidence or permissable subjects of testimony over the timely objection of the Petitioners (App. App'x. pp. 17, 20, 21)?

## CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

Pertinent Constitutional, Statutory, and Regulatory provisions involved are the Fourth Amendment to the Constitution of the United States, Title 18 U.S.C. Secs. 371, 2421 and 2422, and Rule 41(e) of the Federal Rules of Criminal Procedure, which are set forth in the Appendix.

## STATEMENT OF THE CASE

Petitioners were indicted in the District Court of the United States for the Eastern District of North Carolina charging violations of 18 U.S.C. Secs. 371, 2421 and 2422, in substance as follows (App. App'x. pp. 3-9):

First Count — A conspiracy to transport in interstate commerce, Bonnie Jo Carter, for the purpose of prostitution from Kinston, North Carolina, to Doswell, Virginia, and enticing her to become a prostitute.

Second Count — Knowingly enticing, persuading, and inducing the woman, Bonnie Jo Carter, to go from Kinston, North Carolina, to Doswell, Virginia, in interstate commerce for the purpose of prostitution.

Third Count — against Joseph Lemon Boyette for knowingly transporting in interstate commerce the woman, Bonnie Jo Carter, from Kinston, North Carolina, to Doswell, Virginia, for the purpose of prostitution.

Fourth Count — against the Petitioners for knowingly procuring and obtaining transportation for the woman, Bonnie Jo Carter, in interstate commerce from Kinston, North Carolina, to Doswell, Virginia, for the purpose of prostitution.

Petitioners made timely objection to anything discovered or found as a result of the search without a search warrant (App. App'x. pp. 17, 20, 21) when F. B. I. agent Lueders testified concerning the search of the Petitioners' Truck Stop at Doswell, and when the Government offered the guest checks with the figure five (5) or $5.00 or the figure ten (10) or $10.00 marked thereon indicating, according to the Government, the type of prostitution date or engagement which the woman, Bonnie Jo Carter, had with men in accordance with the Petitioner's conspiracy at the Mooring Truck Stop, the Court entertained the objection and ruled thereon although there had been no prior motion to suppress, as it was in his descretion to do (Rule 41 (e) of the Federal Rules of Criminal Procedure) (App. App'x. pp. 17, 20, 21). The trial Court overruled the Petitioners' objection and motion to suppress (App. App'x. p. 20) and permitted the guest checks discovered in the search by the F. B. I. Agents in evidence. The Petitioners were thereafter convicted as follows:

The Defendant, Joseph Lemon Boyette was convicted on Counts One and Three, and sentenced on Count One to a period of three years imprisonment and on Count Three to

a period of three years imprisonment, the periods of imprisonment to run concurrently (App. App'x. pp. 9-10). He has accepted the District Court's judgment.

The Petitioner, Bert Franklin Mooring, was convicted on Count One and Count Four and sentenced on Count One to imprisonment for a period of three years and on Count Four to imprisonment for a period of three years, the periods of imprisonment to run concurrently (App. App'x. pp. 10-11).

The Petitioner, Temasia Bruce Hill Mooring, was convicted on Count One and Count Four and sentenced on Count One to imprisonment for a period of three months and on Count Four to imprisonment for a period of three months, the periods of imprisonment to run concurrently (App. App'x. p. 11).

On Appeal to the United States Court of Appeals for the Fourth Circuit, Petitioners' conviction was affirmed by opinion and judgment dated and filed on January 6, 1962 (Appendix pp. 15-26), Chief Judge Sobeloff dissenting, the Court expressly holding the search of Petitioner's premises legal and the evidence turned up admissable, contrary to Petitioners points, argued orally and by brief in that court.

The material facts are as follows:

On August 2, 1959, Bonnie Jo Carter and the defendant Joseph Lemon Boyette went to the home of Mr. and Mrs. Mooring, in Lenoir County, North Carolina. The jury found that all the defendants and the prosecuting witness, Bonnie Jo Carter, agreed to meet the following Sunday, August 9, 1959, in Snow Hill, Greene County, North Carolina, and to proceed to the place of business of the Petitioners, Mr. and Mrs. Mooring, in Virginia where Bonnie Jo Carter was to engage in prostitution. The meeting in Snow Hill was not held (App. App'x. pp. 13, 14, 15). Thereafter on August 10, 1959, the defendant Joseph Lemon Boyette carried Bon-

nie Jo Carter by automobile to Virginia. They went to the place of business owned and operated by the Petitioners, Mr. and Mrs. Mooring. Mr. and Mrs. Mooring were not there. The defendant, Boyette, and Bonnie Jo Carter then proceeded to Brown's Cabins where they rented a room and registered for the night as man and wife. Then on August 11, 1959, Bonnie Jo Carter began working as a prostitute at the place operated by Mr. and Mrs. Mooring. She remained there for approximately one week and then returned to Kinston, North Carolina. (Gov. App'x. pp. 19-30).

On August 25, 1959, a warrant of arrest was issued for the defendants by the United States Commissioner in Lenoir County, North Carolina. The warrant was forwarded to R. A. Simpson, United States Marshal for the Eastern District of Virginia. The warrant for the arrest of Mr. and Mrs. Mooring was received by the marshal on September 4, 1959 (App. App'x. pp. 1, 2), and was executed by the arrest of Mr. and Mrs. Mooring on August 28, 1959 (App. App'x. pp. 17, 18). The premises included basement, business establishment on the first floor and living quarters on the second floor. During the search, certain guest checks commonly used in restaurants were found by the F. B. I. Agents in waste paper baskets and in drawers. These guest checks, identified as Government Exhibits G-4, G-5, and G-6, had certain figures written thereon (App. App'x. pp. 20, 21). Bonnie Jo Carter had testified for the Government that she never filled a date for more than $5.00, and that a record of the dates was kept by writing the figure "5" on a guest check each time a date was filled (App. App'x. p. 14). There was no evidence to connect Government Exhibits G-4, G-5, and G-6 with these date records and they were admitted in evidence over the objection of the Petitioners and their motion to suppress and the Court then denied the motion of the defendants to restrict the use of the exhibits to corroborating Government's

witness Bonnie Jo Carter, if, in fact, they did corroborate her (App. App'x. pp. 17, 20, 21).

F. B. I. agent, Lueders was also permitted by the District Court to testify concerning the agent's discovery of certain prophylactics and douche bags discovered in their search of the Mooring premises in parts of the premises away from where the Moorings were arrested, likewise over Petitioners' objection (App. App'x. 17, 20, 21), all the articles referred to having been turned up by the F. B. I. Agents in their search of the Mooring premises without a search warrant.

## ARGUMENT

The Writ should be granted for several reasons.

(a) The guest checks offered and received in evidence over the Petitioners' objection and the douche bags and prophylactics discovered by Agent Lueders, none of which was connected with the prosecuting witness, Bonnie Jo Carter, (Gov. App'x. pp. 29-30), were turned up by the agents in a general search for evidence without search warrant and were not found in the immediate presence of the Petitioners Mooring and were not fruits of the crime or instrumentalities of the crime, as the prosecuting witness, Bonnie Jo Carter, was not shown to have used or known of these particular items, although she stated that she wrote guest checks similar to those introduced in evidence (Gov. App'x. p. 29), nor were they stolen property, and the admission of the testimony of the witness, Lueders, concerning these matters and the admission of the guest checks was contrary to the decisions of this Court in *Boyd vs. United States*, 116 U.S. 616, 623-24, *United States vs. Lefkowitz*, 285 U.S. 452, *Go-Bart Importing Co. vs. United States*, 282 U.S. 344, *Harris vs. United States*, 331 U.S. 145.

(b) The prophylactics and douche bags described by the Agent as having been found in the search of the Truck Stop

of the Mooring's were not shown to be connected in any way with the crime charged and the guest checks which were offered and received in evidence were likewise not shown to be connected with the crime. These items, not found within the immediate presence of the Petitioners Mooring when they were arrested, were not immediately visible to the arresting agents nor were they part and parcel of a crime being committed as were the records in *Marron vs. United States*, 275 U.S. 192, but during a search of the entire premises (Gov. App'x. pp. 32, 33) the guest checks were found in one of the cabinets, or a drawer of one of the cabinets, in the kitchen, together with the prophylactics, others in a waste basket in a room occupied by another girl away from where Mr. Mooring was arrested or Mrs. Mooring was arrested. (App. App'x. pp. 35, 36). Some douche bags were found in the basement (Gov. App'x. p. 35), and other douche bags were found in the bathroom on the second floor occupied by Mr. and Mrs. Mooring (Gov. App'x. p. 36).

It is well to note again that the real reason for the search by the F. B. I. agents was solely to uncover evidence to be used at the trial to convict the Petitioners ". . . We searched the lunchroom and cash register and under the counters, and so forth. Found nothing of value towards this case or towards the arrest of the Moorings in connection with interstate transportation of the victim for prostitution . . ." (Gov. App'x. pp. 34-35). Such a search is prohibited by the Fourth Amendment, and its fruits are not admissible in evidence. *Gouled vs. United States*, 255 U.S. 298, *United States v. Lefkowitz*, 285 U.S. 452, nor is testimony concerning them. *Silverthorne Lumber Co. vs. United States*, 251 U.S. 385, 392, *McGinnis vs. United States*, 227 F. 2d 598.

(c) There was ample time for the agents to have secured a search warrant for the Mooring premises, but they failed to do so. The warrant of arrest was dated and issued August

25, 1959, at Kinston, North Carolina, (App. App'x. pp. 1-2). Surely, except for inconvenience to the agents, they could have secured from the Commissioner a search warrant for the Mooring premises for they must have known from the prosecuting witness the procedure to be followed under the alleged conspiracy and what to search for. The arrest of the Moorings and the search of their premises without a search warrant occurred near Doswell, Virginia, three days after issuance of the warrant of arrest (App. App'x. pp. 1, 2, and 17). Under these circumstances it was incumbent upon the agents to secure a search warrant in order to make such a search of the Mooring premises and for the Government to introduce evidence at the trial concerning the articles discovered in the search, if proper subjects of search. This was not done, and the admission of some of these articles, and testimony concerning them all, over objection, was contrary to the decision of this Court in *Chapman vs. United States*, 365 U.S. 610.

(d) Indeed a general search of the entire premises to find whatever evidentiary material which might be turned up would seem to be unlawful, even if bolstered by a search warrant, and its disclosures would be inadmissible in evidence. *Gouled vs. United States*, 255 U.S. 298, *Harris vs. United States*, 331 U.S. 145, *Abel vs. United States*, 362 U.S. 217.

If the testimony of the F. B. I. agent concerning what the agents uncovered in their search of the Petitioners' premises without a search warrant and if the guest checks, all objected to by the Petitioners, were properly admissible in evidence then the Fourth Amendment would seem to be nothing but a stumbling block in the way of crime detection to be easily kicked aside by enforcement agents in the name of convenience and the Amendment should take its place at the foot of the Bill of Rights, no longer considered a protection for the

guilty as well as the innocent against unreasonable and intolerable searches and seizures.

(e) Finally, the Petitioners urge that the Writ should be granted and the judgment of the Court of Appeals be reversed for the clear and cogent reasons stated in the dissenting opinion of Chief Judge Sobeloff in this cause (Appendix pp. 22-26).

## CONCLUSION

It is respectfully submitted that the Writ should issue, and the judgment of the United States Court of Appeals for the Fourth Circuit should be vacated and set aside and that this case should be remanded to the United States District Court for the Eastern District of North Carolina with instructions to set aside the judgments and commitments and to grant a new trial to Petitioners.

Respectfully submitted,

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# Appendix

## Constitutional Provisions

Constitution of the United States
Amendment IV — Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## Statutory Provisions

18 U.S.C. Sec. 371 — Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. Sec. 2421 — Transportation generally

Whoever knowingly transports in interstate or foreign commerce, or in the district of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute

or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

Shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

18 U.S.C. Sec. 2422 — Coercion or enticement of female

Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.

**Rules Provisions — Fed. Rules of Criminal Procedure Rule 41 (e). Motion for Return of Property and to Suppress Evidence.**

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrent, or (4) there was not probably cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

# OPINION AND DISSENTING OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8248

UNITED STATES OF AMERICA
*Appellee,*

*versus*

JOSEPH LEMON BOYETTE, BERT FRANKLIN MOORING, and TEMASIA BRUCE HILL MOORING,
*Appellants.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT NEW BERN. ALGERNON L. BUTLER, DISTRICT JUDGE.

(Argued April 17, 1961. Decided January 6, 1962.)

Before SOBELOFF, Chief Judge and SOPER and HAYNSWORTH, Circuit Judges.

J. Harvy Turner and George Rountree, Jr. (Rountree & Clark on brief) for Appellants, and Julian T. Gaskill, United States Attorney, (Irvin B. Tucker, Jr., Assistant United States Attorney, on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

Out of sordid little cases such as this, important constitutional questions sometimes arise. The appellants, convicted of having procured the interstate transportation of a woman for purposes of prostitution, contend this is such a case. Asserting a violation of their Fourth Amendment rights when their establishment was searched at the time of their arrest, they seek to upset their conviction because

of the receipt in evidence of records, seized during the search, made of their earnings by prostitutes working in the establishment. We think, however, that the search was not unreasonable, and that records of the earnings of the prostitutes were not improperly received in evidence.

Shortly after her return to her home in North Carolina, from whence she had been transported to the "truck stop" of the defendants, Mooring, in Virginia, the victim reported her experience to the police. She told of having been persuaded by Mr. and Mrs. Mooring and her lover, Boyette, all residents of North Carolina, to go to Virginia to work for the Moorings as a prostitute. The Moorings explained to her how she should arrange assignations with truck drivers who visited the Moorings' establishment, what her charges would be, the division of her earnings, and her maintenance of a record of her receipts upon guest checks of the sort commonly used in restaurants. She informed the law enforcement officials that, when working for the Moorings as a prostitute, she recorded her receipts after each transaction upon such a guest check, which, with her receipts, were kept in a drawer in the kitchen portion of the establishment.

Upon the basis of the information given by the victim, warrants for the arrest of Boyette and of the Moorings were issued. The warrants for the arrest of the Moorings were executed at their truck stop in Virginia, Mr. Mooring being arrested in the restaurant portion of the establishment and Mrs. Mooring in a room which she and her husband used as a bedroom when they were in residence there. Immediately after these arrests, FBI agents searched the premises. They looked in the cash register and in cabinets and drawers. They found and seized three guest checks of the sort that had been described by the victim, upon each of which the figures $5.00 had been repeatedly recorded,

and upon two of them there was a notation of a $10.00 transaction. One of these checks was found in the kitchen drawer described by the victim as the place where she had been instructed to keep such records. The others were found in a waste paper basket in one of the three rooms in the establishment, which, apparently, were maintained for the fulfillment of the assignations arranged by the ladies of the place.

These barren rooms, furnished with little that was not requisite to their utilitarian purpose, contained in them no personal articles suggestive of use of these rooms for residential purposes. Each mattress was covered only by a spread. Upon a chair in one of the rooms, a prophylactic contraceptive was conveniently laid out, together with a lubricant, and hung in the two bathrooms in that portion of the building were five douche bottles. The victim testified that she used these rooms for her business purposes, but, when the end of her duty period arrived, she repaired with her lover, Boyette, to a motel where she slept.

The only room in the place which was apparently used for residential purposes was the one room occupied by the Moorings, and in which Mrs. Mooring was arrested. Nothing was seized in that room.

The Moorings do not question the lawfulness of their arrest, or the validity of the warrants which authorized them. They concede that the officers entered the building lawfully.[1] They claim no use of force.[2] They do not even assert a contemporaneous protest on their part, though, of course, under the circumstances no inference of consent can

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[1] Cf. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652.

[2] Cf. Go-Bart Importing Company v. United States, 282 U.S. 344, 51 S. Ct. 153, 75 L.Ed. 374.

[3] Cf. Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed. 2d 668; Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888.

be founded upon the absence of protest. There is nothing to indicate that the arrests were intended as a basis of a search for evidence of other crime,[3] for the defendants were tried only for offenses suggested by the charges upon which they were arrested, and the record contains no suggestion that the agents were looking for anything other than records of the transportation of the women and of their earnings. There was no wanton seizure of the contents of the establishment;[4] the only things seized were the three guest checks bearing upon their face a fragment of the record of the pitiable receipts of the house. The assertion of unreasonableness is founded solely upon the fact that these pieces of paper were found in part in a kitchen drawer and in part in a waste paper basket in one of the rooms provided for the business purposes of the prostitutes.

We need not here enter into the debate over the permissibility of a search without a warrant incident to a lawful arrest when not confined to the clothing of the person arrested. The Supreme Court has held that the Fourth Amendment prohibits only unreasonable searches, and that a reasonable search of the premises where a lawful arrest is made may be conducted incident to the arrest.[5] In the absence of any other aggravating circumstances, premises where the arrest occurs, if under the immediate control and in the possession of the arrested individual, are regarded as an extension of his person for purposes of a search incident to his arrest. The only difference is that the search of the pockets in the clothing of the arrested individual may be general but that of the premises, where the arrest occurs, may be neither general nor unreasonable. No one suggests that a thorough-

[4] Cf. Kremen v. United States, 353 U.S. 346, 77 S.Ct. 828, 1 L.Ed. 2d 876.

[5] Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399; United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; Abel v. United States, 362 U.S. 217, 80 S.Ct. 684, 4 L.Ed. 2d 668.

going search of a man's home could be justified merely because he was arrested in his home upon a minor misdemeanor charge. Here, however, the search of this business establishment for instrumentalities of the crime was reasonably related to the arrest and there were no aggravating circumstances which carried the search beyond the bounds of reasonableness. Unreasonableness is asserted solely on the basis of the fact the area of the search extended to the kitchen drawer and the waste paper basket in the "bedroom." If, however, the search of the entire apartment in Harris[6] incident to the lawful arrest there was a reasonable one, surely the much more limited search of this small restaurant and sporting house, incident to the lawful arrest of its proprietors, was a reasonable one. Mooring's arrest arose out of his panderage. Reasonableness did not require confinement of the search to the restaurant portion of the building where the arrest occurred. The search was reasonably extended to that portion of his building where prostitution was practiced and its wages recorded.

Though the search be reasonable, every article discovered is not subject to seizure. The Supreme Court has frequently adverted to the distinction between seizures of contraband, fruits of crime and the instrumentalities for its accomplishment, weapons and similar articles on the one hand, and the seizure of purely evidentiary materials on the other.[7] Perhaps the influence of the Fifth Amendment is felt here.

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[6] Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399.

[7] Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 524; Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652; Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 467; Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231; United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877; Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399; United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed. 2d 668.

At least, it has been thought that a diary in which its author has recited his criminal conduct, seized in an otherwise lawful search, should not be used against him, just as any other kind of involuntary confession is unusable under the Fifth Amendment.

The guest checks here were not instrumentalities for the accomplishment of the specific crime with which the Moorings were charged, the interstate transportation of a particular woman for purposes of prostitution. They were, however, instrumentalities used in the operation of the brothel, the general criminal enterprise of which the interstate transportation of women was but a part. They were relevant at the trial, particularly in the light of Mrs. Mooring's testimony,* that the girls in her establishment performed no other office than that of waitresses, for it is relevant and material to the interstate transportation charge to show that the establishment to which the woman was carried was in fact operated for purposes of prostitution or debauchery. At the time of seizure, of course, the agents could not know whether those particular checks were those upon which the complaining victim had recorded her earnings, or whether they were records made by other prostitutes of theirs. At the trial the victim could not identify the writing upon these checks as being hers, but they were similar in all respects to the ones she had kept and had described to the agents, and they were found, in part, at the place where she said she was instructed to put them. In these circumstances, we think they were properly subject to seizure as instruments used in the operation of the bawdy house, the criminal enterprise in which the Moorings were engaged. They were instrumentalities of the crime in the same sense that the ledger and the bills for utility services were instrumentalities

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* She, alone, among the three defendants, testified.

[9] Wilson v. United States, 232 U.S. 563, 34 S.Ct. 347, 58 L.Ed. 728.

of the crime of operating a barroom, as was held in Marron v. United States, 275 U.S. 192. They were as closely related to the crime here as were the forged documents to Abel alienage. Abel v. United States, 362 U.S. 217. These pieces of paper bore no incriminating declarations of the defendants. They were a portion of the records, maintained by others, upon the basis of which the defendants divided the spoils of their criminal activity. We find them subject to seizure.

The defendants made no motion prior to trial to suppress the guest checks as evidence. They made no objection at the trial to the evidence descriptive of the establishment and its furnishings, which so strongly points to use of the premises as a brothel. They did object to the receipt in evidence of the guest checks, the objection being made at the time the checks were offered in evidence.[10] The district judge did not decline to rule upon the objection because no motion had been made prior to trial, as required by Rule 41(e) of the Federal Rules of Criminal Procedure. In his discretion, under that rule, he had the right to consider the objection upon its merits. Apparently he did so, overruling the objection because he found it without merit and not because he found it untimely. We, therefore, have considered the objection on its merits. Our consideration, however, brings us to the conclusion that this record discloses no violation of any right of the defendants under the Fourth Amendment.

Since the guest checks were lawfully seized and they were relevant to the inquiry at the trial, there was no error in their admission into evidence.

The defendants have two other contentions, each of which is devoid of substance.

Objection was made to an inquiry of the defendant, Mrs. Mooring, on cross examination as to whether or not she had

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[10] It is not suggested that Boyette had any standing to make the objection.

been convicted in absentia in Virginia for the operation of a bawdy house and had forfeited bond. When the objection was overruled, she answered saying, "I haven't had a copy or anything of it. I haven't had any word." The matter was not further pursued.

Since she had put her reputation as a witness in issue, we think this limited inquiry was not impermissible.

Finally, the defendants complain that they were not permitted affirmatively to contradict the prosecuting witness on a collateral matter.

On cross examination, the prosecuting witness denied that she had an argument with her husband in a store in North Carolina. The defense offered witnesses who were prepared to testify that the two had an argument in the store, though no relation was suggested between the incident in the store, if it occurred, and any substantive issue in the trial.

The defendants had no right to undertake, with affirmative testimony, to contradict a witness on purely collateral and irrelevant matter. The trial judge has a duty to confine the scope of the trial to reasonable bounds, and he properly limited inquiry into this unrelated matter to the questions directed to the prosecuting witness on cross examination.

Our review of the record of the trial discloses that these three defendants were fairly tried, and the evidence fully supports the verdict of guilty. Since we find no violation of the Fourth Amendment rights of the defendants, and hence no error in the receipt in evidence of the records seized during the search of the Moorings' premises, we conclude that the judgments of conviction were properly entered.

*Affirmed.*

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SOBELOFF, Chief Judge, dissenting:

When an important constitutional question arises in a

"sordid little case," it is as necessary to decide it correctly as if the case were a big one, for the precedent laid down will be cited in later decisions. Moreover, in sanctioning search of a house, the rule prescribed may influence officers' conduct in situations affecting not only the depraved but the innocent. Because I think the court's decision widens beyond permissible limits the scope of searches incident to lawful arrest, I feel obliged to dissent.

The court's opinion begins with an acknowledgment of the correct rule of law, but fails to apply it. There is a clear distinction between merely evidentiary materials, which may not be seized, and certain limited categories of articles which may be taken. The latter group consists of the instrumentalities and fruits of crime, weapons, and contraband, the possession of which is itself illegal. These categories have been strictly defined and should not be expanded. One example of the application of this rule is found in *United States v. Lefkowitz*, 285 U.S. 452 (1932), where federal prohibition agents seached an office as an incident to a lawful arrest, and seized record books, memoranda, envelopes and other papers. Mr. Justice Butler for a unanimous Supreme Court held that the seizure violated the Fourth Amendment because the "papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected." 285 U.S. at 464. The Court restated the rule, originally expressed in *Boyd v. United States*, 116 U.S. 616, 623-24 (1886), in the following language:

> "The decisions of this Court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties

> for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime." 285 U.S. at 465-66.

Although in *Harris v. United States*, 331 U.S. 145 (1947), the Court upheld a seizure of altered sective service cards on the ground that possession of them was itself a crime, the Court, speaking through Chief Justice Vinson, was at pains to repeat the rule in the following terms:

> "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime." 331 U.S. at 154.

For similar expressions of this rule, see *Abel v. United States*, 362 U.S. 217, 237-39 (1960); *United States v. Rabinowitz*, 339 U.S. 56, 64 n.6 (1950); *Gouled v. United States*, 255 U.S. 298, 309 (1921).

The court here views the guest check receipts which were seized by the arresting officers, not as evidentiary materials, but as "instrumentalities of the crime," relying for this upon

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[1] Even if the *Marron* decision stood alone, it does not altogether fit this case, for in *Marron* one feature which the Court stressed was that the conspiracy was actively in progress in the officers' presence. Whatever the force, as a matter of logic, this circumstance may possess, it is pertinent to point out that in our case the interstate journey and the purpose for which it was undertaken had definitely ended.

*Marron v. United States*, 275 U.S. 192 (1927). There, Mr. Justice Butler, speaking for the Court, did depart from the rule in *Boyd v. United States*, supra, and approved the seizure by federal prohibition agents of bills and ledger books as an incident to the arrest of the operators of a "speakeasy." If that case still represented the law, it might lend support to the court's conclusion. However, the *Marron* decision has been subjected to devitalizing qualifications in subsequent cases. Only four years later, in *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), an opinion also from the pen of Mr. Justice Butler emphasized that the *Marron* decision was exceptional because in that case the seized materials were immediately visible to the federal agents and because there was no general rummaging in search for them. 282 U.S. at 358. Accordingly, in *Go-Bart* the Supreme Court invalidated the search and seizure of record books and private papers. And the following years, in *United States v. Lefkowitz*, 285 U.S. 452 (1932), Mr. Justice Butler found additional reasons to limit *Marron*: the crime of possessing illegal liquor was presently being carried on at the time of the arrest in the *Marron* case, and the seized records were at that very moment being used in the execution of the crime. 285 U.S. at 465. In light of these two later cases, it is apparent that *Marron* has been severely damaged, if not destroyed, as authority for a general rule that would treat records as instrumentalities of crime.

One can readily perceive the justification for Mr. Justice Butler's deliberate narrowing of *Marron* and return to *Boyd* and *Gouled*. There is a strong public interest, altogether unrelated to facilitating the conviction of the arrested person, for permitting seizure of the classes of articles mentioned in the rule as stated in the *Lefkowitz* and *Harris* cases. For example, stolen property may be seized to effectuate its speedy return to the real owners. Weapons may be taken to

prevent the escape of the arrested person. The purpose in seizing the instrumentality by which the crime was committed is to prevent its possible use in the commission of additional crimes. Illegally possessed property may be taken for the same reason.

None of the above reasons applies to the guest check receipts involved in the present case. It is indeed difficult to see how these papers, if the officers had not taken possession of them, coould possibly be used to perpetrate further crimes. Yet this is the sole justification for seizing the instrumentalities of a crime in the face of the Fourth Amendment's prohibitions.

In addition, I am at a loss to comprehend how these receipts are "instrumentalities of the crime" as these words are normally understood. The crime with these defendants are charged is the transportation of a woman in interstate commerce for immoral purposes. The guest checks were introduced as documentary proof of the immoral practices of this prosecutrix and other waitresses. The checks themselves played no role in the unlawful interstate transportation. Nor is there anything illegal or immoral in possessing these receipts. Being merely records of illicit activities, and not the means by which they were done, these receipts are distinctly outside the eategory of items the law permits to be seized.

The pieces of paper in question were desired by the officers, and in the circumstances could be desired, solely for use as evidence, and the officers had no other possible interest in them. Although made as an incident to a lawful arrest, a search and seizure that can have no other motivation is condemned by the law. Apparently, not even a search warrant could validly issue for such a purpose. See *Harris v. United States*, 331 U.S. 145, 154 (1947); *Gouled v. United States*, 255 U.S. 298, 309 (1921). The law makes this restriction,

not out of solicitude for culprits, but to protect innocent persons against excessive searches and seizures. Understandably, the restriction becomes irksome when the direct beneficiary is an unsavory character accused of a base crime; the temptation is strong to relax the rule's enforcement. Yet, unless we are prepared to accord even to such a person the protection of the Fourth Amendment, it cannot be preserved for the more deserving.

For these reasons, I would reverse and remand for a new trial.